

K&S 22W66 LLC v Bonello

2022 NY Slip Op 33688(U)

October 20, 2022

Supreme Court, New York County

Docket Number: Index No. 656210/2021

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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K&S 22W66 LLC

Plaintiff,

- v -

JOHN LOUIS BONELLO,

Defendant.

INDEX NO. 656210/2021

MOTION DATE 07/18/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action seeking, *inter alia*, damages for breach of a contract for sale of a condominium unit located at 22 West 66th Street in Manhattan (the unit), the defendant seller, John Louis Bonello, moves, pre-answer, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, pursuant to CPLR 6514 to vacate and discharge the Notice of Pendency and for an award of sanctions against the plaintiff purchaser. The plaintiff opposes the motion. The motion is granted in its entirety, save for the application for sanctions.

II. BACKGROUND

In support of his motion, the defendant submits, *inter alia*, the complaint, his own affidavit, an affirmation of counsel, the unsigned contract of sale, proof of a down payment returned to the plaintiff, text messages between the defendant’s broker for the unit and the plaintiff, and email correspondence between counsel for the parties. This proof establishes that,

in or about October 2021, the plaintiff offered to purchase the subject unit from the defendant for \$3,750,000.00. The parties then, through counsel, began to negotiate the contract of sale. On October 7, 2021, counsel for the defendant emailed counsel for the plaintiff a proposed contract of sale and rider between their respective clients. The email stated, in relevant part,

Please be advised that a copy of this Contract is being simultaneously delivered to our client, who has not yet had the opportunity to review it, and is subject to any additional comments he may have. It is specifically agreed that the transmittal of this Contract does not constitute an offer by our client, and is not binding until actually signed by him.

Paragraph 29 of the contract provided that “[t]his Contract shall not be binding or effective until properly executed and delivered by Seller and Purchaser.”

On October 26, 2021, the defendant’s counsel sent an email to the plaintiff’s counsel stating that the defendant “would proceed with [the plaintiff] provided that (1) the contract [the defendant’s counsel] sent yesterday evening is final with no further negotiation; and (2) deposit is funded by Friday.” In text messages exchanged at approximately 10:00 p.m. that same day, the defendant’s broker and the plaintiff likewise agreed that the plaintiff would have “the signed pages tomorrow” and “funds no later than Friday.” On Wednesday, October 27, 2021, the plaintiff’s counsel sent the signed contract to the defendant’s counsel. The defendant did not sign the agreement. Later that same day, at 1:25 p.m., the defendant’s counsel informed the plaintiff’s counsel that the defendant decided not to sign the agreement. The defendant’s counsel sent another email five minutes later, at 1:30 p.m., confirming receipt of the wire transfer for the down payment and asking for instructions on how to return the funds to the plaintiff.

The instant action was commenced on October 29, 2021. This motion ensued.

The plaintiff alleges in the complaint that a contract for sale was formed as a result of its compliance with the defendant’s requests to (1) have a signed agreement by Wednesday, October

27, 2022, and (2) wire the money to the defendant by Friday, October 29, 2022. The defendant maintains that since he had declined to sign the agreement, which was thus not delivered, it was without effect and he was not contractually bound to sell the unit to the plaintiff.

III. LEGAL STANDARD

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v supra; State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). However, where the allegations contained in the pleadings consist of bare legal conclusions, they are not entitled to such consideration. See Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997).

Dismissal under CPLR 3211(a)(1) is warranted when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1). Art & Fashion Grp. Corp. v Cyclops Prod., Inc., 120 AD3d 436, 438 (1st Dept. 2014); see Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc., 120 AD3d 431, 432-33 (1st Dept. 2014).

IV. DISCUSSION

It is well settled law that an enforceable agreement requires an offer, acceptance, consideration, mutual assent, and an intent to be bound. Ostojic v Life Med. Techs., Inc., 201 AD3d 522, 523 (1st Dept. 2022); see Kowalchuk v Stroup, 61 AD3d 118, 121 (1st Dept. 2009); see also Silber v New York Life Ins. Co., 92 AD3d 436, 439 (1st Dept. 2012). “Provided there is objective evidence establishing that the parties intended to be bound, an agreement need not be signed to be enforceable, unless the parties have agreed that their contract will not be binding until executed by both sides.” Ostojic v Life Med. Techs., Inc., *supra*; Kowalchuk v Stroup, *supra* at 125. The October 7 transmittal email from the defendant’s counsel to the plaintiff’s counsel expressly states that the contract of sale “is not binding until actually signed by [the defendant].” Thus, it is “essentially undeniable” that the defendant did not intend to be bound until he signed the agreement. Amsterdam Hospitality Group, LLC v Marshall–Alan Associates, Inc., *supra*. These statements operate as “forthright, reasonable signals” that the defendant “means to be bound only by a written agreement,” an intent that is to be honored. Kowalchuk v Stroup, *supra* at 123; see Jordan Panel Sys. Corp. v Turner Constr. Co., 45 AD3d 165 (1st Dept. 2007). Further, as stated previously, Paragraph 29 of the subject contract expressly provides that it is not binding or effective unless executed by both parties and delivered.

Even if the court were to find that the October 26, 2021, email from the defendant’s counsel constituted an offer *not* contingent on a signed writing, the plaintiff’s principal admits in an affidavit that the plaintiff did not fulfill the second condition of acceptance, *i.e.*, wiring of the down payment, until *after* it received notice that the defendant was withdrawing the offer of sale. This defeats the plaintiff’s assertion that a contract was formed. See Silber v New York Life Ins. Co., 92 AD3d 436, 440 (1st Dept. 2012) (“Revocation is effective at the moment that the offeree

receives it, so long as the offer has not yet been accepted.”). Finally, since the agreement was for the sale of real property, under the Statute of Frauds, it is void and unenforceable unless signed by the parties. See General Obligations Law (GOL) § 5-703(2).

Since no enforceable agreement was formed between the parties, the plaintiff has failed to establish the first element of a breach of contract claim: the very existence of a contract. Therefore, the second cause of action must be dismissed. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). The plaintiff’s first cause of action is for specific performance of the agreement. While specific performance may be a proper remedy in actions for breach of contract for the sale of real property, here the claim must be dismissed as there was no agreement. Cho v 401-403 57th St. Realty Corp., 300 AD2d 174, 175, (2002); see e.g. Judnick Realty Corp. v 32 W. 32nd Street Corp., 61 NY2d 819 (1984).

The absence of a contract also requires dismissal of the third cause of action. “A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties.” Duration Mun. Fund, L.P. v J.P. Morgan Sec., Inc., 77 AD3d 474, 474–75, (1st Dept. 2010); see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C., 51 AD3d 549 (1st Dept. 2008); Triton Partners v Prudential Sec., 301 AD2d 411 (1st Dept. 2003).

To state a claim for unjust enrichment, a plaintiff must allege that: “(1) the [defendant] was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered”. Schroeder v Pinterest Inc., 133 AD3d 12, 26 (1st Dept 2015) quoting Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012). The plaintiff does not allege any loss and the defendant did not wrongfully gain anything from the plaintiff as a result of the transaction. When the plaintiff sent the defendant

the down payment of \$375,000.00 on October 28, even after the defendant's counsel had informed the plaintiff's counsel that the defendant reneged on the agreement, the defendant returned the money the very same day. Therefore, the defendant was not enriched at all at the plaintiff's expense, much less unjustly, and the sixth cause of action is dismissed.

To prevail on a theory of promissory estoppel, a party must establish “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance”. Condor Funding, LLC v 176 Broadway Owners Corp., 147 AD3d 409, 411 (1st Dept. 2017) quoting MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836, 841–842 (1st Dept. 2011). Promissory estoppel has been applied to preclude a party from asserting a Statute of Frauds defense, but only where nonenforcement of the contract would be so egregious as to render unconscionable the application of the Statute of Frauds. See Carvel Corp. v Nicolini, 144 AD2d 611 (2nd Dept. 1988); see also Am. Bartenders Sch., Inc. v 105 Madison Co., 91 AD2d 901 (1st Dept. 1983), aff'd, 59 NY2d 716 (1983). Here, the plaintiff fails to allege any basis for a finding of unconscionability in its complaint. Indeed, the nonenforcement of the unsigned agreement could not be unconscionable even if the defendant accepted a better offer from another purchaser.

The plaintiff fails to sufficiently plead the claim of negligent misrepresentation because it does not demonstrate the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the party alleging the cause of action. See Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson, 73 NY2d 417 (1989). Nor does the plaintiff identify any “misinformation” imparted by the defendant.

Upon dismissal of the entire complaint, there is no longer a pending action “affect[ing] the title to, or the possession, use or enjoyment of real property.” CPLR 6501. Therefore, the Notice of Pendency filed by the plaintiff against the subject unit is cancelled pursuant to CPLR 6514(a).

Finally, the defendant's application for sanctions is denied. While the court has found the plaintiff's claims to be without merit, the mere prosecution of this action does not rise to the level of "frivolous conduct" within the meaning of 22 NYCRR 130-1.1(c).

V. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendant's motion is granted to the extent that the complaint is dismissed in its entirety pursuant to CPLR 3211(a)(1) and CPLR 3211 (a)(7); and the motion is otherwise denied, and it is further

ORDERED that the Notice of Pendency filed by the plaintiff on October 29, 2021, dated October 28, 2021, is vacated and discharged pursuant to CPLR 6514(a); and it is further

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the aforesaid notice of pendency; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh), and it is further

ORDERED that the Clerk shall mark the file and enter judgment accordingly.

DATED: October 20, 2022


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON